MOTION FILED
OCT 29 1986

No. 86-522

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR INTERSTATE PIPELINES

DALE A. WRIGHT
(Counsel of Record)
JAMES T. MCMANUS
DOUGLAS O. WAIKART
WRIGHT & TALISMAN, P.C.
1050 17th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-1194
Counsel for Amici Interstate Pipelines

October 29, 1986

[Additional Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

MICHAEL R. WALLER
Vice President and General Counsel
TERENCE J. COLLINS
Deputy General Counsel
Tennessee Gas Transmission Company
P.O. Box 2511
Houston, Texas 77001
Counsel for Amici
Tennessee Gas Pipeline Company, a Division of Tenneco Inc., East Tennessee Natural Gas Company, Midwestern Gas Transmission Company

JOHN T. KETCHAM
MCGEE & KETCHAM, P.C.
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20036
Counsel for Amicus
Algonquin Gas Transmission Company

WILLIAM W. BRACKETT
DANIEL F. COLLINS
TERRY O. BRACKETT
1899 L Street, N.W.
Suite 501
Washington, D.C. 20036
Counsel for Amicus
ANR Pipeline Company

CHERYL M. FOLEY
Vice President and General Counsel
P.O. Box 1188
Houston, Texas 77001
Counsel for Amici
Florida Gas Transmission Company, Transwestern Pipeline Company

NARINDER J.S. KAPHURIA
Secretary and General Attorney
2100 Buhl Building
Detroit, Michigan 48226

JAMES D. MCKINNEY, JR.
ROSS, MARSH & FOSTER
888 16th Street, N.W.
Washington, D.C. 20006
Counsel for Amicus
Great Lakes Gas Transmission Company

FRANK J. DUFFY
Vice President and General Counsel
MERLIN E. REMMENGA
DARI B. DORNAN
2223 Dodge Street
Omaha, Nebraska 68102

GEORGE J. MEIBURGER
FRANK X. KELLY
GALLAGHER, BOLAND, MEIBURGER AND BROSNAN
821 15th Street, N.W.
Washington, D.C. 20005
Counsel for Amicus
Northern Natural Gas Company, Division of Enron Corporation

BOBBY E. POTTS
General Counsel
One Williams Center
P.O. Box 3288
Tulsa, Oklahoma 74172
Counsel for Amicus
Northwest Central Pipeline Corporation

WILLIAM J. SEARS
General Counsel
STEPHEN K. SCHROEDER
Associate General Counsel
295 Chipeta Way
P.O. Box 8900
Salt Lake City, Utah 84108
Counsel for Amicus
Northwest Pipeline Corporation

JUDY M. JOHNSON
Vice President and General Counsel
CARL W. ULRICH
Assistant General Counsel
Texas Eastern Transmission Corporation
3300 First City Tower
Houston, Texas 77002

J. EVANS ATTWELL
VINSON & ELKINS
3300 First City Tower
Houston, Texas 77002
Counsel for Amicus Texas Eastern Transmission Corporation

KIM R. COCKLIN
General Counsel
3800 Frederica Street
Owensboro, Kentucky 42301

JOHN F. HARRINGTON
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
Counsel for Amicus Texas Gas Transmission Corporation

R. V. LOFTIN, JR.
Vice President and General Counsel
P.O. Box 1396
Houston, Texas 77251

THOMAS F. RYAN, JR.
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
Counsel for Amicus Transcontinental Gas Pipe Line Corporation

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-522

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION OF INTERSTATE PIPELINES FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Tennessee Gas Pipeline Company, a Division of Tenneco Inc.; Algonquin Gas Transmission Company; ANR Pipeline Company; East Tennessee Natural Gas Company; Florida Gas Transmission Company; Great Lakes Gas Transmission Company; Midwestern Gas Transmission Company; Northern Natural Gas Company, Division of Enron Corporation; Northwest Central Pipeline Corporation; Northwest Pipeline Corporation; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Transcontinental Gas Pipe Line Corporation; and Transwestern Pipeline Company (Interstate Pipelines) hereby respectfully move for leave to file the attached Brief *Amici Curiae* in support of the petition for writ of certiorari (Petition) in this case.

I.

INTERESTS OF INTERSTATE PIPELINES

Interstate Pipelines are natural gas pipeline companies engaged in the interstate transportation and sale of natural gas subject to the jurisdiction of Respondent, Federal Energy Regulatory Commission (FERC or Commission) under the Natural Gas Act (NGA), 15 U.S.C. § 717, *et seq.* Interstate Pipelines sell gas in 42 states with an aggregate total rate base of more than eight billion dollars. During 1985, Interstate Pipelines transported and sold about eight trillion cubic feet of gas, serving numerous customers that, in turn, supply natural gas to millions of ultimate residential, commercial and industrial gas consumers.

Interstate Pipelines' rates for the transportation and sale of natural gas are regulated by the Commission pursuant to authority granted under Sections 4 and 5 of the NGA, 15 U.S.C. § 717c and § 717d, respectively. The question presented here relates to whether the Commission properly acted under Section 4 rather than Section 5 of the NGA in its decision on a rate change filing of Petitioner, Colorado Interstate Gas Company (CIG). This issue will similarly affect Interstate Pipelines, other interstate pipeline companies, their wholesale customers and the ultimate consumers of natural gas on a recurring basis each time any interstate pipeline makes a NGA Section 4 rate change filing with the Commission. The Tenth Circuit's sanction of the Commission's exercise of retroactive ratemaking establishes a new and conflicting precedent that will undoubtedly be invoked by the Commission in connection with its continuing NGA Section 4 review of any "proposed change of rate, charge, classification, or service" filed by an interstate pipeline company (App. D at 27a). Interstate Pipelines thus have a real and vital interest in the expeditious resolution of this issue via review by this Court.

II.

POSITION OF THE PARTIES

The written consents to filing of the attached Brief *Amici Curiae* of Petitioner and all Respondents except Natural Gas Pipeline Company of America (Natural) and its customers, The Peoples Gas Light & Coke Company (Peoples) and North Shore Gas Company (North Shore), have been obtained and are attached to the original of this motion filed with this Court. Significantly, those parties not consenting to the filing of the attached Brief *Amici Curiae* (Natural and its customers) realize a direct pecuniary benefit from the Tenth Circuit's affirmance of the FERC's retroactive elimination of the specific minimum bill provision in CIG's tariff with Natural.[1] While the Petition and attached Brief *Amici Curiae* of necessity challenge that specific result by seeking review by this Court, Interstate Pipelines are more broadly concerned with the conflicting precedent established by the Tenth Circuit's sanction of the Commission's exercise of retroactive ratemaking under Section 4 of the NGA and the negative implication of that precedent for the interstate natural gas industry and the proper and efficient administration of the NGA.

III.

CONSIDERATION OF INTERSTATE PIPELINES' BRIEF *AMICI CURIAE* WILL ASSIST THE COURT'S REVIEW

Given their significant role in the interstate gas pipeline industry and the likely recurring regulatory impact of the precedent below on their operations and interstate gas consumers, Interstate Pipelines submit they are uniquely situated to assist the Court in its deliberations on

---

[1] As recognized by the Tenth Circuit below, the Commission's retroactive elimination of the minimum bill precluded CIG from collecting approximately $20 million from Natural (App. A at 4a). Had these charges been recovered from Natural, Natural's customers, including Peoples and North Shore, would have paid these costs through Natural's rates.

the Petition through the submission of the attached Brief *Amici Curiae*. Interstate Pipelines' industry-wide perspective and extensive experience with regulation under the NGA will help assure that the Court is fully apprised of all aspects of the important question presented.

WHEREFORE, Interstate Pipelines respectfully request the Court to grant this motion and to accept and consider their attached Brief *Amici Curiae* in support of the Petition in this case.

Respectfully submitted,

DALE A. WRIGHT
(Counsel of Record)
JAMES T. MCMANUS
DOUGLAS O. WAIKART
WRIGHT & TALISMAN, P.C.
1050 17th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-1194
Counsel for Amici Interstate Pipelines

MICHAEL R. WALLER
Vice President and General Counsel
TERENCE J. COLLINS
Deputy General Counsel
Tennessee Gas Transmission Company
P.O. Box 2511
Houston, Texas 77001
Counsel for Amici Tennessee Gas Pipeline Company, a Division of Tenneco Inc., East Tennessee Natural Gas Company, Midwestern Gas Transmission Company

JOHN T. KETCHAM
MCGEE & KETCHAM, P.C.
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20036
Counsel for Amicus Algonquin Gas Transmission Company

WILLIAM W. BRACKETT
DANIEL F. COLLINS
TERRY O. BRACKETT
1899 L Street, N.W.
Suite 501
Washington, D.C. 20036
Counsel for Amicus ANR Pipeline Company

CHERYL M. FOLEY
Vice President and General Counsel
P.O. Box 1188
Houston, Texas 77001
Counsel for Amici Florida Gas Transmission Company, Transwestern Pipeline Company

NARINDER J.S. KAPHURIA
Secretary and General Attorney
2100 Buhl Building
Detroit, Michigan 48226

JAMES D. MCKINNEY, JR.
ROSS, MARSH & FOSTER
888 16th Street, N.W.
Washington, D.C. 20006
Counsel for Amicus Great Lakes Gas Transmission Company

FRANK J. DUFFY
Vice President and General Counsel
MERLIN E. REMMENGA
DARI B. DORNAN
2223 Dodge Street
Omaha, Nebraska 68102

GEORGE J. MEIBURGER
FRANK X. KELLY
GALLAGHER, BOLAND, MEIBURGER AND BROSNAN
821 15th Street, N.W.
Washington, D.C. 20005

Counsel for Amicus Northern Natural Gas Company, Division of Enron Corporation

BOBBY E. POTTS
General Counsel
One Williams Center
P.O. Box 3288
Tulsa, Oklahoma 74172

Counsel for Amicus Northwest Central Pipeline Corporation

WILLIAM J. SEARS
General Counsel
STEPHEN K. SCHROEDER
Associate General Counsel
295 Chipeta Way
P.O. Box 8900
Salt Lake City, Utah 84108

Counsel for Amicus Northwest Pipeline Corporation

JUDY M. JOHNSON
Vice President and General Counsel
CARL W. ULRICH
Assistant General Counsel
Texas Eastern Transmission Corporation
3300 First City Tower
Houston, Texas 77002

J. EVANS ATTWELL
VINSON & ELKINS
3300 First City Tower
Houston, Texas 77002

Counsel for Amicus Texas Eastern Transmission Corporation

KIM R. COCKLIN
General Counsel
3800 Frederica Street
Owensboro, Kentucky 42301

JOHN F. HARRINGTON
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Amicus Texas Gas Transmission Corporation

R. V. LOFTIN, JR.
Vice President and General Counsel
P.O. Box 1396
Houston, Texas 77251

THOMAS F. RYAN, JR.
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006

Counsel for Amicus Transcontinental Gas Pipe Line Corporation

TABLE OF CONTENTS

	Page
INTEREST OF THE INTERSTATE PIPELINES IN GRANTING OF THE PETITION FOR WRIT OF CERTIORARI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Petition Should Be Granted To Resolve The Conflict Between The Circuits And The Conflict With The Decisions Of This Court	4
II. The Petition Should Be Granted To Insure The Proper And Efficient Administration Of The Natural Gas Act	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981) 7
City of Willcox v. *FPC*, 567 F.2d 394 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978) 6
FPC v. *Hunt*, 376 U.S. 515 (1964) 8
FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) 7
FPC v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) 7, 8
FPC v. *Texaco, Inc.*, 377 U.S. 33, *reh'g denied*, 377 U.S. 974 (1964) 6
New Orleans Public Service, Inc. v. *FERC*, 659 F.2d 509 (5th Cir. 1981) 5
Public Service Commission of New York v. *FERC*, 642 F.2d 1335 (D.C. Cir. 1979), *cert. denied*, 454 U.S. 879 (1981) 5
Sea Robin Pipeline Co. v. *FERC*, 795 F.2d 182 (D.C. Cir. 1986) 5
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 8
Wisconsin v. *FPC*, 373 U.S. 294, *reh'g denied*, 375 U.S. 870 (1963) 8, 10

STATUTES AND REGULATIONS:

Natural Gas Act,
15 U.S.C. § 717, *et seq.* 2
Section 4, 15 U.S.C. § 717c ..... *passim*
Section 5, 15 U.S.C. § 717d 2, 6, 9
18 C.F.R. § 154.38(d) (4) (vi) 9

MISCELLANEOUS:

Ceiling Prices; Old Gas Pricing Structure, Order No. 451, 51 Fed. Reg. 22,168 FERC Stat. & Reg. (CCH) ¶ 30,701 (1986) 9

TABLE OF AUTHORITIES—Continued

Page

Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, Order No. 380, 49 Fed. Reg. 22,778, FERC Stat. & Reg. (CCH) ¶ 30,571, *reh'g denied*, Order No. 380-A, 49 Fed. Reg. 31,259, FERC Stat. & Reg. (CCH) ¶ 30,584, *clarified*, Order No. 380-C, 49 Fed. Reg. 43,625, FERC Stat. & Reg. (CCH) ¶ 30,607 (1984), *aff'd sub nom., Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied sub nom., Transwestern Pipeline Co.* v. *FERC*, 57 U.S.L.W. 3758 (May 20, 1986) (No 85-1219) 9

FPC Ann. Rep. to Congress (1977) 9

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42,408, FERC Stat. & Reg. (CCH) ¶ 30,665, *reh'g denied*, Order No. 436-A, 50 Fed. Reg. 52,217, FERC Stat. & Reg. (CCH) ¶ 30,675 (1985) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-522

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF AMICI CURIAE FOR INTERSTATE PIPELINES

This Brief *Amici Curiae* is filed pursuant to Rule 36 in support of the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit (Petition) filed by Colorado Interstate Gas Company (CIG) on September 29, 1986.

INTEREST OF THE INTERSTATE PIPELINES IN GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.; Algonquin Gas Transmission Company; ANR Pipeline Company; East Tennessee Natural Gas Company; Florida Gas Transmission Company; Great Lakes

Gas Transmission Company; Midwestern Gas Transmission Company; Northern Natural Gas Company, Division of Enron Corporation; Northwest Central Pipeline Corporation; Northwest Pipeline Corporation; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Transcontinental Gas Pipe Line Corporation; and Transwestern Pipeline Company (Interstate Pipelines) are natural gas pipeline companies engaged in the interstate transportation and sale of natural gas subject to the jurisdiction of Respondent, Federal Energy Regulatory Commission (FERC or Commission) under the Natural Gas Act (NGA), 15 U.S.C. § 717, *et seq.* Interstate Pipelines sell gas in 42 states with an aggregate total rate base of more than eight billion dollars. During 1985, Interstate Pipelines transported and sold about eight trillion cubic feet of gas, serving many customers that, in turn, supply natural gas to millions of ultimate residential, commercial and industrial gas consumers.

Interstate Pipelines' rates for the transportation and sale of natural gas are regulated by the Commission pursuant to Sections 4 and 5 of the NGA, 15 U.S.C. § 717c and § 717d, respectively. The question presented here relates to whether the Commission properly acted under Section 4 rather than Section 5 of the NGA in its decision on a rate change filing of Petitioner, CIG. This issue will similarly affect Interstate Pipelines, other interstate pipeline companies, their wholesale customers and the ultimate consumers of natural gas on a recurring basis each time any interstate pipeline makes a NGA Section 4 rate change filing with the Commission. The Tenth Circuit's affirmance of the Commission's retroactive elimination of a long-standing tariff "minimum bill" provision that CIG did not propose to change raises a significant issue requiring resolution by this Court. Moreover, that court's sanction of the Commission's retroactive rate order establishes a precedent that will undoubtedly be invoked by the Commission in connection with its continuing NGA Section 4 review of any "proposed change

of rate, charge, classification, or service" filed by an interstate pipeline company (App. D at 27a). That precedent, however, squarely conflicts with the decisions of other Courts of Appeals on the same issue and with applicable decisions of this Court. Because resolution of the question presented by the Tenth Circuit's decision below is essential to the proper, future administration of the NGA, Interstate Pipelines submit this Brief *Amici Curiae* in support of the Petition.

SUMMARY OF ARGUMENT

The Petition should be granted so that this Court may review an important issue central to the interpretation and enforcement of the NGA. Resolution of this issue by this Court is essential to the proper, future administration of the NGA as it affects the entire natural gas industry and interstate gas consumers.

The decision of the Court of Appeals for the Tenth Circuit below is in direct conflict with decisions of the Courts of Appeals for the District of Columbia and Fifth Circuits and with decisions of this Court that have recognized the statutory limitation on the Commission's authority in NGA Section 4 proceedings to impose retroactively changes in rates or tariff provisions not proposed by the natural gas company in its NGA Section 4 filing. Until resolved by this Court, the issue thus created will continue to arise in nearly every interstate pipeline company rate case before the Commission. Indeed, the uncertainty and divisiveness engendered by this conflict can only harm the natural gas industry and gas consumers and impede the appropriate and efficient administration of the NGA.

ARGUMENT

I. The Petition Should Be Granted To Resolve The Conflict Between The Circuits And The Conflict With The Decisions Of This Court

While the facts of the case below concerned the retroactive elimination of a "minimum bill provision" in CIG's filed tariff for sales to Natural Gas Pipeline Company of America (Natural), the Tenth Circuit's approval of the Commission's action in eliminating that provision retroactively was necessarily and by its very language an extremely broad ruling (App. A at 6a-7a) (citations omitted; emphasis supplied):

> The filing of new rates by a natural gas company triggers Commission review under § 4. In a § 4 proceeding, the gas company has the burden of justifying its newly filed rates. If the gas company fails to show that its increased rates are just and reasonable, the Commission modifies the rates. This modification may be made retroactive through the Commission's refund power to the date the increased rates became effective. . . .
>
> Section 4 of the Natural Gas Act gives the Commission broad authority to scrutinize new rates filed by a gas company to insure that such rates are just and reasonable. The Commission may review a gas company's rate structure to insure *that all parts of the structure—both old and new—operate together to produce just and reasonable rates.* . . . By filing the rate increase, a gas company assumes the risk of having to justify *its entire rate structure, including integral provisions of that structure which the company does not propose to change,* . . . A provision which serves as a charging mechanism is considered an integral part of a rate increase and a gas company's rate structure. . . .

Thus, in upholding the Commission's retroactive elimination of a long-standing minimum bill tariff provision which was "neither altered nor mentioned" in CIG's rate

filing under NGA Section 4, the Tenth Circuit found sweeping authority under that section for the Commission to review and eliminate retroactively to the date the filed rates became effective a filing pipeline's "entire rate structure . . . including integral provisions of that structure which the company does not propose to change" (App. A at 2a, 6a) (citations omitted).

As shown in the Petition (at 5-9), the decision of the Tenth Circuit below is in clear and direct conflict with decisions of the Courts of Appeals in both the District of Columbia and Fifth Circuits holding that the Commission must act on a prospective basis pursuant to the authority of NGA Section 5, not retroactively under Section 4, where the Commission seeks to modify an existing tariff provision that the pipeline itself has not proposed to change.

Where the Tenth Circuit below found Section 4 review and retroactive modification appropriate if the unchanged minimum bill provision "is integral to the rate structure of CIG" (App. A at 7a), the District of Columbia Circuit has consistently rejected the Commission's use of such Section 4 powers as to "any change in a ratemaking component" or "rate methodology" not proposed by the natural gas company. *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182, 186 (D.C. Cir. 1986) (quoting *Public Service Commission of New York* v. *FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1979), *cert. denied*, 454 U.S. 879 (1981)). The District of Columbia Circuit's interpretation has been followed by the Fifth Circuit Court of Appeals. *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d 509, 523 (5th Cir. 1981) ("Because the pipeline had not requested a change in its cost allocation method, the Commission could not impose such a change without following the Section 5(a) procedures."). Under these decisions, a change not proposed by the pipeline company can only be made pursuant to proper proceedings under Section 5, which does not allow *retroactive* change. *See City of*

Willcox v. *FPC*, 567 F.2d 394, 402 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

The Petition should be granted to resolve this conflict between the circuits and promote uniform interpretation and application of the NGA. *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 37, *reh'g denied*, 377 U.S. 974 (1964) ("We granted [certiorari] because of an apparent conflict between that [Tenth Circuit] decision and [a case] decided by the Court of Appeals for the Ninth Circuit.").

The Petition should be granted for the further reason that the Tenth Circuit's decision below is inconsistent with this Court's prior construction of Sections 4 and 5 of the NGA. This Court's decisions establish principles which compel the conclusion that the Commission's authority to modify existing tariff provisions *not proposed to be changed by the pipeline company* is prospective only, since such authority arises only under Section 5, and that retroactive application of Commission orders under Section 4(e) may occur only relative to a rate or tariff provision that is changed in the first instance by the interstate pipeline company.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956), the Court defined the powers of the Commission under NGA Sections 4 and 5 (emphasis supplied):

> The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be "unjust, unreasonable, unduly discriminatory, or preferential." This is neither a "rate-making" nor a "rate-changing" procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to all the rates of a natural gas company, *whether*

> *long-established or newly changed*, but in the *latter case* the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a *newly changed rate or contract* (except "industrial" rates), the further powers (1) to preserve the status quo pending review of the *new rate* by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the *change* became effective.

Similarly, in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 644-45 (1972), after noting that a Commission order under Section 5(a) "can have only prospective application" the Court found that under Section 4 (emphasis supplied):

> a pipeline's *tariff amendments* filed with the FPC go into effect in 30 days unless suspended by the Commission. If a filing is challenged or the FPC of its own motion deems it appropriate, it may suspend the *amended tariff* for up to five months, at the end of which time the *amended tariff* becomes effective pending the completion of hearings.[1]

This Court's prior decisions thus clearly support the conclusion that the Commission's power under NGA Section 4 to suspend and retroactively modify, by means of its refund authority, rates and pipeline tariff provisions is limited to *changes* or *amendments* in the rates or tariffs made by the pipeline company.

The Tenth Circuit below maintained that this Court's decision in *FPC* v. *Tennessee Gas Transmission Co.*, 371

---

[1] Likewise, this Court has determined the Commission has no power to alter a rate retroactively under NGA Section 5 "[because Section 5] bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.'" *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1981). *See also FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 153 (1962). Thus, it is clear that the NGA's proscription against retroactive ratemaking protects both the company and consumer alike.

U.S. 145 (1962), stands for the proposition that the filing of a rate increase subjects the pipeline company's "entire rate structure" to retroactive modification by the Commission under Section 4(e). However, it is clear that the Court's decision in *Tennessee Gas* was concerned with the rate change initiated by Tennessee and not with unchanged provisions of Tennessee's tariff. *See*, 371 U.S. at 152. That decision thus provides no support for the Tenth Circuit's decision below.

II. The Petition Should Be Granted To Insure The Proper And Efficient Administration Of The Natural Gas Act

Equally significant to and supportive of the Petition is the need to insure proper administration of the NGA. The Commission's erroneous position that it may exercise Section 4 authority to modify *retroactively* a previously approved tariff provision that the natural gas pipeline company does *not* propose to change—consistently rejected until now by the Courts of Appeals—can only gain vitality as a result of the Tenth Circuit's affirmance of that position below. Indeed, certain parties have already relied on the Tenth Circuit's decision below during proceedings in several recent rate cases before the Commission.

As it has done on prior occasions, this Court should grant the Petition and review the decision of the Court of Appeals in order to resolve this important issue and provide the guidance required to insure the appropriate, future administration and enforcement of the NGA. *See FPC* v. *Hunt*, 376 U.S. 515, 517 (1964); *Wisconsin* v. *FPC*, 373 U.S. 294, 302-03, *reh'g denied*, 375 U.S. 870 (1963); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 147 (1962); and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 337 (1956).

The frequency with which this issue will continue to arise absent resolution by this Court cannot be overstated. The rates charged by all interstate pipeline companies

are regulated by the Commission pursuant to Sections 4 and 5 of the NGA. The issue presented here will arise each time any one of these companies makes a rate change filing.

Under the Commission's Regulations, interstate pipeline companies subject to the Commission's jurisdiction are required to file tariff sheets restating their rates at least once every three years. 18 C.F.R. § 154.38(d)(4)(vi). Over the years, however, has been common for interstate pipeline companies to file rate changes more frequently, particularly during periods when the volumes of gas sold or transported have declined between rate filings and prevented the recovery of Commission-approved rates of return.[2]

The Commission's own Regulations and Section 4 policy thus ensure that the issue arising from the Tenth Circuit's decision below will frequently recur and impact directly and adversely on interstate pipeline companies and the wholesale customers and ultimate consumers served by those pipelines. It is essential that this Court grant the Petition and review the decision of the Court of Appeals below "because of the importance of this case

---

[2] For instance, during the period of natural gas curtailment in the 1970s, interstate pipelines typically filed rate changes pursuant to Section 4 as frequently as twice annually. *See*, FPC Ann. Rep. to Congress, App. D, Table 3—Pipeline Rate Changes, 1961-77 (1977). In this regard, it is possible that the uncertainty as to interstate pipeline sales and transportation volume levels created by Commission Order Nos. 380, *et seq.* (FERC Stat. & Reg. (CCH) Order No. 380, ¶ 30,571; Order No. 380-A, ¶ 30,584; Order No. 380-C, ¶ 30,607 (1984)); Order Nos. 436 *et seq.* (FERC Stat. & Reg. (CCH) Order No. 436, ¶ 30,665; Order No. 436-A, ¶ 30,675 (1985)); and Order No. 451 (FERC Stat. & Reg. (CCH) ¶ 30,701 (1986)) may result in the same frequency of pipeline rate filings in the future. Indeed, in Order No. 436 the Commission recognized that customer reductions of firm sales entitlements under that order, which are permitted once each year, could make it "necessary for the pipeline to file a rate case to spread the difference [in costs] over all firm sales and transportation services." Order No. 436, FERC Stat. & Reg. (CCH) ¶ 30,665 at 31,522 (1985).

in the administration and future operation of the Natural Gas Act." *Wisconsin* v. *FPC*, *supra*, 373 U.S. at 302-03.

CONCLUSION

For the foregoing reasons, Interstate Pipelines support the petition for a writ of certiorari and urge the Court to grant the Petition and, upon due consideration, reverse the decision of the Court of Appeals.

Respectfully submitted,

DALE A. WRIGHT
(Counsel of Record)
JAMES T. MCMANUS
DOUGLAS O. WAIKART
WRIGHT & TALISMAN, P.C.
1050 17th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-1194
Counsel for Amici
Interstate Pipelines

MICHAEL R. WALLER
Vice President and General
Counsel
TERENCE J. COLLINS
Deputy General Counsel
Tennessee Gas Transmission
Company
P.O. Box 2511
Houston, Texas 77001
Counsel for Amici
Tennessee Gas Pipeline
Company, a Division of
Tenneco Inc., East Tennessee
Natural Gas Company,
Midwestern Gas Transmission
Company

JOHN T. KETCHAM
MCGEE & KETCHAM, P.C.
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20036
Counsel for Amicus
Algonquin Gas Transmission
Company

WILLIAM W. BRACKETT
DANIEL F. COLLINS
TERRY O. BRACKETT
1899 L Street, N.W.
Suite 501
Washington, D.C. 20036
Counsel for Amicus
ANR Pipeline Company

CHERYL M. FOLEY
Vice President and General
Counsel
P.O. Box 1188
Houston, Texas 77001
Counsel for Amici
Florida Gas Transmission
Company, Transwestern
Pipeline Company

NARINDER J.S. KAPHURIA
Secretary and General Attorney
2100 Buhl Building
Detroit, Michigan 48226

JAMES D. MCKINNEY, JR.
ROSS, MARSH & FOSTER
888 16th Street, N.W.
Washington, D.C. 20006
Counsel for Amicus
Great Lakes Gas
Transmission Company

FRANK J. DUFFY
Vice President and General Counsel
MERLIN E. REMMENGA
DARI B. DORNAN
2223 Dodge Street
Omaha, Nebraska 68102

GEORGE J. MEIBURGER
FRANK X. KELLY
GALLAGHER, BOLAND, MEIBURGER AND BROSNAN
821 15th Street, N.W.
Washington, D.C. 20005

Counsel for Amicus Northern Natural Gas Company, Division of Enron Corporation

BOBBY E. POTTS
General Counsel
One Williams Center
P.O. Box 3288
Tulsa, Oklahoma 74172

Counsel for Amicus Northwest Central Pipeline Corporation

WILLIAM J. SEARS
General Counsel
STEPHEN K. SCHROEDER
Associate General Counsel
295 Chipeta Way
P.O. Box 8900
Salt Lake City, Utah 84108

Counsel for Amicus Northwest Pipeline Corporation

JUDY M. JOHNSON
Vice President and General Counsel
CARL W. ULRICH
Assistant General Counsel
Texas Eastern Transmission Corporation
3300 First City Tower
Houston, Texas 77002

J. EVANS ATTWELL
VINSON & ELKINS
3300 First City Tower
Houston, Texas 77002

Counsel for Amicus Texas Eastern Transmission Corporation

KIM R. COCKLIN
General Counsel
3800 Frederica Street
Owensboro, Kentucky 42301

JOHN F. HARRINGTON
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Amicus Texas Gas Transmission Corporation

R. V. LOFTIN, JR.
Vice President and General Counsel
P.O. Box 1396
Houston, Texas 77251

THOMAS F. RYAN, JR.
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006

Counsel for Amicus Transcontinental Gas Pipe Line Corporation